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BEFORE THE

# Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In re Applications of	)	MM Docket No. <u>93-178</u>
Howard B. Dolgoff	)	File No. BPH-911223ME
Mark and Renee Carter	)	File No. BPH-911224MD
For Construction Permit for a New	)	
FM Station on Channel 292A in	)	
Miramar Beach, Florida	)	

To: Administrative Law Judge  
John M. Frysiak

## JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

Howard B. Dolgoff ("Dolgoff") and Mark and Renee Carter ("the Carters"), by their attorneys and pursuant to Section 73.3525 of the Commission's Rules, hereby jointly request that the Commission approve the Settlement Agreement filed herewith, dismiss Dolgoff's application, and grant the Carters' application. In support of this Joint Request the following is shown:

1. Dolgoff and the Carters have filed mutually exclusive applications for a construction permit for a new FM station on Channel 292A in Miramar Beach, Florida. These applications have been designated for hearing by a Hearing Designation Order released June 29, 1993 (MM Docket No. 93-178), 8 FCC Rcd 4337 (1993). Dolgoff and the Carters have since discussed the possibility of a settlement in this proceeding and

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have reached the Settlement Agreement which is attached hereto as Exhibit A. This Settlement Agreement proposes the dismissal of Dolgoff's application in exchange for reimbursement of a portion of Dolgoff's legitimate and prudent expenses reasonably incurred in connection with preparing, filing, prosecuting and settling his application, and the grant of the Carters' application.

2. Dolgoff and the Carters believe that the public interest will be served by Commission approval of the attached Settlement Agreement. As a result of such approval, and concurrent dismissal of Dolgoff's application and grant of the Carters' application, a hearing and further proceedings herein will become unnecessary. This will accomplish a substantial saving of time and expense to the applicants and the Commission, and will facilitate the earlier provision of a first FM broadcast transmission service to the community of Miramar Beach, Florida.

3. As set forth in the accompanying Declarations provided on behalf of Dolgoff and the Carters, the applications of Dolgoff and the Carters were not filed for the purpose, directly or indirectly, of entering into or carrying out the terms of any Settlement Agreement generally or the attached Settlement Agreement specifically, and the consideration to be paid by the Carters to Dolgoff is less than Dolgoff's legitimate and prudent expenses in connection with preparing, filing, prosecuting and settling of his application. The Declarations executed on behalf of Dolgoff and the Carters are attached hereto as Exhibit B.

WHEREFORE, for good cause shown, Dolgoff and the Carters hereby request that the Settlement Agreement filed herewith as Exhibit A be approved; that the application of Dolgoff be dismissed with prejudice; and that the Carters' application be granted.

Respectfully submitted,

RENEE AND MARK CARTER

By: 

Frank J. Martin, Jr.

Their attorney

Sutherland, Asbill & Brennan  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2404

HOWARD B. DOLGOFF

By: 

Irving Gastfreund, Esq.

His attorney

Kaye, Sholer, Fierman, Hays & Handler  
901 15th Street, N.W.  
Washington, D.C. 20005

October 27, 1993

**EXHIBIT A**

**SETTLEMENT AGREEMENT**

## **SETTLEMENT AGREEMENT**

THIS AGREEMENT is entered into as of the date of the last signature to be made on page 7 hereof, between Howard B. Dolgoff ("Dolgoff") and Mark and Renee Carter ("the Carters").

### **W I T N E S S E T H:**

WHEREAS, Dolgoff has pending before the Federal Communications Commission ("Commission") an application for a construction permit for a new FM broadcast station to be operated on Channel 292A in Miramar Beach, Florida (File No. BPH-911223ME); and

WHEREAS, the Carters have pending before the Commission an application for a construction permit for a new FM broadcast station to be operated on Channel 292A in Miramar Beach, Florida (File No. BPH-911224MD); and

WHEREAS, the said applications are mutually exclusive and have heretofore been designated for consolidated hearing by the Commission; and

WHEREAS, the parties to this Agreement desire to avoid the time and expense of a comparative hearing and thereby also to permit the earlier provision of a first FM broadcast transmission service to the community of Miramar Beach, Florida; and

WHEREAS, the parties believe that the public interest will be served by the earlier institution of a first commercial FM broadcast transmission service to Miramar Beach, Florida, and by diminishing the cost and length of the proceedings before the Commission and, further, by conserving the resources of the

parties to this proceeding and of the staff of the Commission;  
and

WHEREAS, Dolgoff is willing to dismiss his application in return for partial reimbursement of his legitimate and prudent expenses reasonably incurred in preparation, filing, prosecution and settlement of his application; and

WHEREAS, the Carters are willing to pay Dolgoff the sum specified on the terms indicated below in return for Dolgoff's dismissal of his application;

NOW THEREFORE, in consideration of their mutual promises, the parties hereto agree as follows:

1. Commission Consent

This Agreement is entered into subject to approval by the Administrative Law Judge or the Commission, and shall be void unless the Administrative Law Judge or the Commission shall approve it.

2. Joint Request for Approval of Agreement

Within five (5) days from the date of the last signature to be made on page 7 hereof, the parties hereto agree to file with the Commission's Administrative Law Judge a Joint Request for Approval of this Agreement. The joint request shall be accompanied by a copy of the executed Agreement as well as other supporting documentation as required by Section 73.3525 of the Commission's Rules. If for any reason other than default of a party the FCC or its Administrative Law Judge fails to approve this Agreement, dismiss Dolgoff's application and grant the

Carters' application, within three (3) months after submission of the Joint Request for Approval hereof, then either party may terminate this Agreement upon ten (10) days written notice to the other and, in that event, the proceeding shall be restored to its prior status.

3. Dismissal of Dolgoff's Application

Dolgoff agrees to request dismissal of his pending application for authority to construct a new non-commercial FM Station to be operated on Channel 292A in Miramar Beach, Florida (File No. BPH-911223ME) subject to the contingency specified in paragraph 5 of this Agreement.

4. Consideration

It is agreed that the Carters shall pay to Dolgoff the sum of Thirty Thousand Dollars (\$30,000.00), at the time and upon the condition specified in Paragraph 5 of this Agreement. Such payment to Dolgoff shall be made by hand delivery of a check in the amount of Thirty Thousand Dollars (\$30,000.00) drawn on a Sutherland, Asbill & Brennan Escrow Account and made payable to the order of the Kay, Scholer, Fierman, Hays & Handler Escrow Account.

5. Time and Condition of Payment

The consideration specified in paragraph 4 of this Agreement shall be paid to Dolgoff within five (5) days after a decision or order of the Administrative Law Judge dismissing Dolgoff's application and granting the Carters' application for a construction permit for Channel 292A in Miramar Beach, Florida,

shall have become final (i.e., shall be no longer subject to any administrative or judicial reconsideration or review).

6. Deposit in Escrow Account

To assure full and timely performance hereunder by the Carters, the Carters shall deposit within five (5) days from the date of the last signature to be made on page 7 hereof, the sum specified in Paragraph 4 hereof into a Sutherland, Asbill & Brennan Escrow Account. Counsel for the Carters shall immediately notify Dolgoff upon receipt of such funds from the Carters and deposit thereof into such Escrow Account. Such sum shall be paid to Dolgoff by a check drawn on such Sutherland, Asbill & Brennan Escrow Account as specified in Paragraph 4 hereof at the time and upon the condition specified in Paragraph 5 hereof. Such sum shall be returned to the Carters upon material default by Dolgoff which is not cured by Dolgoff within ten (10) days after notice thereof to Dolgoff by the Carters, or upon termination of this Agreement pursuant to Paragraph 2 hereof. Failure by the Carters to deposit the said sum within the time specified in this Paragraph shall constitute a material default of this Agreement.

7. Default

In the event of default in the performance of the obligations imposed upon either party hereto, the other party shall be entitled to pursue any remedies for redress of injuries available at law or in equity or otherwise, including reasonable attorney's fees and court costs incurred in enforcement of this



Agreement. In addition, Dolgoff acknowledges that the Carters have no adequate remedy at law if Dolgoff shall fail to perform any of his obligations hereunder, and Dolgoff confirms and agrees that the Carters' right to specific performance is essential to protect the Carters' rights and interests. Accordingly, Dolgoff here agrees that, in addition to whatever other remedies the Carters elect to pursue, the Carters shall have the right to seek specific performance of this Agreement, and Dolgoff agrees to waive any claim that the Carters have an adequate remedy at law and to interpose no opposition, legal or otherwise, to the propriety of specific performance as a remedy.

8. Conduct of Parties

Each party hereto agrees to cooperate with the other and with the Commission by expeditiously providing each other or the Commission with any additional information which reasonably may be required, and by doing all other acts reasonably necessary to effectuate the objectives of this Agreement. Each party likewise agrees to refrain from any action that might directly or indirectly have a material adverse effect on realization of the objectives of this Agreement.

9. Assignment

This Agreement may not be assigned by either party hereto without the prior written consent of the other.

10. Entire Agreement

This Agreement is the only agreement between the parties hereto and contains all of the terms and conditions

agreed upon with respect to the subject matter hereof. It shall be binding upon the parties hereto, their successors and assigns. Each party represents and warrants that this Agreement has been properly authorized and that the execution of this Agreement is a binding obligation of the party.

11. Applicable Law

This Agreement and all its terms shall be construed pursuant to the laws of the State of Florida. Should any legal action be brought by any party hereto to enforce or to interpret the terms of this Agreement, said action shall be brought in an appropriate forum within the State of Florida pursuant to the laws of the State of Florida.

12. Notice

Any notice required by or relating to this Agreement shall be deemed given when mailed by registered or certified mail, postage prepaid, to the following:

To Dolgoff:                    Mr. Howard B. Dolgoff  
                                     3186 Ferns Glen Drive  
                                     Tallahassee, FL 32308

Copy (which shall not constitute notice) to:

Irving Gastfreund, Esq.  
Kaye, Scholer, Fierman, Hays  
& Handler  
901 15th Street N.W.  
Washington, D.C. 20005

To the Carters:                Mark and Renee Carter  
                                     Route 2  
                                     Box 2810  
                                     Santa Rosa Beach, FL 32459

Copy (which shall not constitute notice) to:

Frank J. Martin, Jr., Esq.  
Sutherland, Asbill & Brennan  
1275 Pennsylvania Ave.  
Washington, D.C. 20004

13. Headings

The headings contained in this Agreement have been inserted for the purposes of convenience only and shall be given no effect in the construction or interpretation of this Agreement.

14. Counterparts

This Agreement may be executed in one or more counterparts, and all executed counterparts shall constitute one Agreement, binding on all parties hereto, notwithstanding that the parties are not signatory to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Settlement Agreement on the day(s) and date(s) specified below.

HOWARD B. DOLGOFF

Date: 10-21-93

Howard B. Dolgoff  
Howard B. Dolgoff

MARK AND RENEE CARTER

Date: \_\_\_\_\_

\_\_\_\_\_  
Mark Carter

Date: \_\_\_\_\_

\_\_\_\_\_  
Renee Carter

Copy (which shall not constitute notice) to:

Frank J. Martin, Jr., Esq.  
Sutherland, Asbill & Brennan  
1275 Pennsylvania Ave.  
Washington, D.C. 20004

13. Headings

The headings contained in this Agreement have been inserted for the purposes of convenience only and shall be given no effect in the construction or interpretation of this Agreement.

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IN WITNESS WHEREOF, the undersigned have executed this Settlement Agreement on the day(s) and date(s) specified below.

HOWARD B. DOLGOFF

Date: \_\_\_\_\_

\_\_\_\_\_  
Howard B. Dolgoff

MARK AND RENEE CARTER

Date: 10/25/93

Mark Carter  
Mark Carter

Date: 10/25/93

Renee Carter  
Renee Carter

**EXHIBIT B**

**DECLARATIONS**

**DECLARATION OF HOWARD B. DOLGOFF**

I, Howard B. Dolgoff, hereby declare as follows:

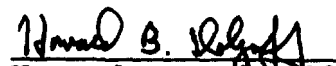
1. My application for a construction permit for a new FM station, File No. BPH-911223ME, in Miramar Beach, Florida was not filed for the purpose of reaching or carrying out the Settlement Agreement between me and Mark and Renee Carter executed by me on this date, or any other such agreement.

2. Other than the consideration specified in Paragraph 4 of said Settlement Agreement, I have neither been promised nor have I been paid, directly or indirectly, any consideration whatsoever in return for the dismissal of my application. The consideration to be provided to me pursuant to said Paragraph 4 does not exceed my legitimate and prudent expenses reasonably incurred in the filing, preparation, prosecution and settlement of my application, as demonstrated and documented by the appended Declaration of Irving Gastfreund, Esquire, of the law firm of Kay, Scholer, Fierman, Hays & Handler.

3. It is my belief that, for the reasons stated in the Settlement Agreement, approval by the Commission of the Settlement Agreement is in the public interest.

4. I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct.

Executed this 21<sup>st</sup> day of October, 1993.

  
Howard B. Dolgoff

**DECLARATION OF MARK AND RENEE CARTER**

We, Mark and Renee Carter, hereby declare as follows:

1. Our application for a construction permit for a new FM station, File No. BPH-911224MD, in Miramar Beach, Florida was not filed for the purpose of reaching or carrying out the Settlement Agreement of this date between Howard B. Dolgoff and us or any other such agreement.


2. Other than the consideration specified in said Settlement Agreement, we have neither promised nor been promised any consideration to or by Dolgoff, or any other person, in return for the dismissal of Dolgoff's application.

3. We believe that, for the reasons stated in the Settlement Agreement, approval by the Commission of the Settlement Agreement is in the public interest.

4. We declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct.

Executed this 25<sup>th</sup> day of October, 1993.

  
Mark Carter

  
Renee Carter

### DECLARATION

I, Irving Gastfreund, do hereby declare, certify and state as follows:

1. I am Washington Counsel with the law firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"). Kaye, Scholer is the law firm which assisted Howard B. Dolgoff in connection with the preparation, filing and prosecution of his application (File No. BPH-911223ME) for a construction permit for a new FM radio station on Channel 292A in Miramar Beach, Florida.

2. In pursuit of the aforementioned Miramar Beach, Florida FM construction permit, Howard B. Dolgoff has incurred total legal fees with Kaye, Scholer well in excess of the \$30,000 settlement payment which he is to receive under the Settlement Agreement which she has entered into with Mark and Renee Carter. The legal services performed by Kaye, Scholer in this connection included, without limitation, preparing, filing and prosecuting Mr. Dolgoff's application, amendments thereto, preparation of pleadings in MM Docket No. 93-178 before the FCC, involving Mr. Dolgoff's application, etc.

3. The legal expenses referenced herein were legitimately and prudently incurred by Howard B. Dolgoff in connection with



the prosecution of his aforementioned Miramar Beach, Florida,  
application.

I hereby declare, certify and state, under penalty of  
perjury, that the foregoing is true and correct to the best of my  
knowledge, information and belief.

  
Irving Gastfreund

Date: 10-25-93

CERTIFICATE OF SERVICE

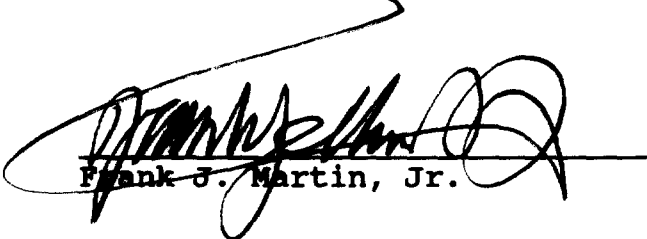
I hereby certify that on this 27<sup>th</sup> day of October, 1993, a copy of the foregoing Joint Motion For Approval of Settlement Agreement has been served by U.S. mail, postage paid, upon the following:

Irving Gastfreund, Esq.  
Kaye, Scholer, Fierman, Hays & Handler  
901 15th Street, N.W.  
Washington, D.C. 20005

Paulette Laden, Esq.\*  
Hearing Branch, Enforcement Division  
Mass Media Bureau  
2025 M Street, N.W., Suite 7212  
Washington, D.C. 20554

The Honorable John M. Frysiak\*  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W.  
Room 223  
Washington, D.C. 20554

Chief, Data Management Staff\*  
Federal Communications Commission  
Audio Services Division  
Mass Media Bureau  
1919 M Street, N.W., Room 350  
Washington, D.C. 20554



Frank J. Martin, Jr.

\* By hand delivery